separately. But what the appellant now seeks to achieve by this application is to ask this court to cure its lapse and preserve its previous position. Let me also add that if this court were to set aside the charging order, the appellant would be better off than all other unsecured creditors. The cases so strenuously relied upon by the appellant refer to the need of ensuring pari passu distribution among unsecured creditors. But here the appellant is claiming as a secured creditor. I do not think it lies in the mouth of the appellant to quote principles which application here would defeat the very interest of those for whom the principles were intended to protect.

The appellant has failed to show that there had been any serious irregularity in the plaintiffs' application to obtain the charging order. That should suffice to dismiss this appeal. Further, having examined the merits relating to the making of the charging order as discussed above, I find that the appellant has not shown that the plaintiffs and the third party had acted with undue haste or had taken any unfair advantage. The appellant has failed to show that it was inequitable to make the order absolute.

For the foregoing reasons, I would dismiss the appeal with costs.

Order accordingly.

Solicitors: *Foo & Quek*; *Chu Chan Gan & Ooi*; *Arthur Loke & Partners.*

Reported by *Wong Kim Fatt*

VD Sujatha v G Prabhakaran Nair

HIGH COURT (SINGAPORE) – DIVORCE NO 69 OF 1986
CHAN SEK KEONG J
21 JULY 1988

Civil Procedure – Costs – Order for costs – Construction of order – Order for costs of proceedings made at time of grant of decree nisi – Ambiguity in order – Question of maintenance adjourned – Costs of maintenance proceedings – Discretion of court

Family Law – Maintenance proceedings – Costs – Order for costs – Construction of order – Order for costs of proceedings made at time of grant of decree nisi – Ambiguity in order

When granting the decree nisi on a petition for divorce, the judge had ordered, inter alia, that 'the respondent do pay the petitioner the costs of these proceedings' and that the question of maintenance for the petitioner be adjourned. Subsequently, in maintenance proceedings before another judge, the petitioner obtained an order for maintenance for which no order for costs was made as it was not asked for. The petitioner then applied for review of the maintenance order on the ground that further facts had come to light which justified a higher award but later withdrew her application. A question arose regarding the costs of the maintenance proceedings.

The senior assistant registrar when taxing the petitioner's bill of costs held that the order for costs made by the previous judge meant that the entire costs of the petition, in which the question of maintenance was one prayer, were to be borne by the respondent. The respondent applied for review of the relevant items of the bill of costs.

Held, allowing the application: (1) It is an established principle that costs are in the discretion of the court and that it is not competent for the court to fetter its discretion as to costs of future applications in the cause the circumstances of which cannot possibly be known to it at the date of the decree nisi. Any costs to be incurred subsequently in any ancillary matter should be awarded separately upon the merits of that application.

(2) Where an order of the court is capable of being construed to have effect in accordance with or contrary to established principles of law or practice, the proper approach, in the absence of manifest intention, is not to attribute to the judge an intention or a desire to act contrary to such principles or practice but rather in conformity with them. If in the present case the order on its true interpretation by its own force imposed a liability for all future costs on the respondent, it would be an improper order. Therefore as the order was ambiguous, the expression 'in these proceedings' in the said order should be construed to refer only to the proceedings in connection with the primary relief for dissolution of the marriage. The said order should not be construed to and it does not render the respondent liable for all costs in respect of proceedings subsequent to the hearing of the petition on the dissolution of the marriage. Such costs must be asked for and given separately in each subsequent proceeding.

Case referred to
1 *Fenston* v *Fenston* [1945] 2 All ER 700 (folld)

LJ Low (Miss) for the petitioner.
B Ganeshamoorthy for the respondent.

Cur Adv Vult

Chan Sek Keong J: This is an application by the respondent for review of 18 items allowed by the senior assistant registrar in the taxation of costs by the petitioner against the respondent. These items pertained to maintenance proceedings subsequent to the divorce proceedings in which Wahab Ghows J, when granting the decree nisi, made an order for costs in the following terms:

> ... and it is ordered that:
> (1) the question of maintenance or lump sum or sums for the petitioner be adjourned to chambers for a date to be fixed by the registrar;
> (2) the respondent do pay the petitioner the costs of these proceedings.

At the hearing on 25 November 1986 for maintenance before me in chambers, I made an order that the respondent pay to the petitioner a lump sum of $5,500 in lieu of periodic maintenance on the ground that the petitioner had decided to return permanently to India. At this

hearing, no order on costs was made as it was not asked for. The parties were given liberty to apply in case some difficulty should arise in regard to the payment in a lump sum.

On 4 February 1987, the petitioner applied to review the order on the ground that further facts had come to light which justified a higher award. Counsel for the respondent objected to the application on the ground that the order could not be reviewed. I then adjourned the application to 4 March 1987 for further argument. On that day, the parties were granted an adjournment to 3 April 1987 when the petitioner decided to withdraw her application for review.

Counsel for the respondent then asked for costs of the application to review. I reproduce herein the notes of submissions of counsel taken by me:

Ganesh	:	My client should be given costs of this further hearing.
Low	:	Costs should not be given because application is continuation of issue of ancillary matters. Costs were ordered against respondent at hearing of petition. Not a separate and distinct proceeding.
Ganesh	:	She asked for variation. Costs to respondent.
Low	:	Within four days.
Order	:	No costs.

My note clearly shows that I made no order against the petitioner in respect of her application to review. This order had nothing to do with the original hearing on 25 November 1986. Miss Low's submission in reply to Mr Ganesh's application for costs was that her client was entitled to costs even though she was withdrawing her application for review because she had been awarded 'costs of these proceedings' in the general order of costs made by Wahab Ghows J in the divorce proceedings. To this argument, I can only recall remarking, although it is not minuted in my notes, that it was up to her to persuade the registrar in taxation that the order on costs of Wahab Ghows J had the effect as contended by her, but that as far as the application for review was concerned, I was not awarding costs to the respondent.

In objecting to the 18 items of costs relating to the maintenance proceedings in the taxation by the senior assistant registrar, counsel for the respondent submitted that I had expressed the view that the order as to costs in the divorce proceedings did not apply to the maintenance proceedings. I might have expressed such a view but I cannot recall having done so. In any case, it was purely obiter and I intend to consider this application on its merits and with an open mind.

Counsel went on to argue that in principle the order of Wahab Ghows J on costs could not be applicable to subsequent ancillary matters. He referred to the decision of *Fenston* v *Fenston*.[1] The senior assistant registrar distinguished the decision of *Fenston* v *Fenston*[1] on the following grounds:

(a) the order for costs in that case was differently worded from the one made by Wahab Ghows J;
(b) the co-respondent there was not a party to either summons, whereas here the respondent was a party to the divorce proceedings;
(c) the applications there were taken out after the decree absolute but here maintenance was prayed for in the petition.

The senior assistant registrar held that the order of costs made by Wahab Ghows J meant 'the entire costs of the petition, in which the question of maintenance was one prayer, are to be borne by the respondent'. He accordingly allowed the 18 items of costs to be included in the bill of costs for taxation.

Before me, counsel for the respondent referred to a passage in para 959 of 4 *Halsbury's Laws of England*, 4th Ed, where the general rule on costs in divorce proceedings in England is stated as follows:

> What the order for costs includes
>
> When a party is condemned in the costs of a suit, it does not follow that the party so condemned is liable for all costs incurred both up to the hearing and thereafter (see *Fenston* v *Fenston* [1945] 2 All ER 700). Such costs are deemed to include the subsequent application for decree absolute, but do not include as a matter of course applications for subsequent interlocutory orders or for ancillary relief; every such further order must deal with the costs thereof.

In *Fenston* v *Fenston*,[1] a common form of order was made in a decree nisi condemning the co-respondent in the 'costs incurred and to be incurred on behalf of the said petition in this cause'. The wife was given custody of the infant son. After the decree was made absolute, the wife married the co-respondent and asked for leave to take the son out of the jurisdiction. The husband opposed the application and filed a summons for custody to be given to him. The co-respondent filed an affidavit in support of the wife's application but was not a party to either summons. The judge granted the wife's application and made no order on the husband's application. He then directed that the costs in the wife's application be costs in the cause. This had the effect of making the co-respondent liable for the costs of the wife's application. The husband appealed successfully and was given custody. He asked for costs of the custody summons be costs in the cause and that the co-respondent, although not a party, be ordered to pay the costs of the appeal. Notice of intention to ask for such costs was served on the co-respondent. The question at issue was whether the court could properly make such an order the effect of which would be to impose a liability on the co-respondent for costs of proceedings to which he was not a party and in which he was not before the court.

The Court of Appeal held that (a) an order, contained in a decree nisi, as to 'costs to be incurred' must be construed as covering by its own force such future costs only as the court might consider to be fairly payable by the co-respondent; such costs might accordingly be directed to be costs in the cause; (b) on the facts, the co-respondent, who had entered an appearance, was aware of the summonses which were to be treated on an equal footing and the co-respondent must pay the costs of each summons and the costs of the appeal, the husband's application being necessitated by the wife's application.

As to the form of the order for costs, Lord Greene MR said (at p 702) as follows:

> The first matter for consideration is the form of the order as to costs contained in the decree nisi, a form which counsel from their researches informed us had been in use for a great number of years and was the form regularly used. It appears that in practice the order as to costs 'to be incurred' is interpreted in the Divorce Division, not as covering by its own force all future costs in the proceedings, but as covering only such future costs as the court may consider to be fairly payable by the co-respondent and may accordingly direct to be costs in the cause. Indeed, if the order on its true interpretation went further than this and by its own force imposed a liability for all future costs on the co-respondent it would, in our opinion, be an improper order. Costs are in the discretion of the court and it is not competent to the court to fetter its discretion as to the costs of future applications in the cause the circumstances of which cannot possibly be known to it at the date of the decree nisi. Such future applications may relate to a large variety of questions and may take place over long periods of years and the extent to which, if at all, the co-respondent ought to be made liable for the costs of them must in each case depend on the circumstances.

As regards the principle on which a court may order the co-respondent to pay the costs of ancillary proceedings, Lord Greene MR said (at p 703):

> The principle upon which costs of applications subsequent to decree may be awarded against a co-respondent is an intelligible one for, broadly speaking, it is the co-respondent's conduct which has caused such costs to be incurred. But it does not appear to be the practice, nor is it suggested that it should be the practice, to award such costs against the co-respondent in every case. The court exercises its discretion and only awards such costs against the co-respondent where it is satisfied that it is just to do so. But surely the question whether it is just or not ought not to be decided against the co-respondent unless he has a real opportunity of placing the facts before the court and presenting such arguments as he may think appropriate. Otherwise the court may well make its order in ignorance of relevant facts which would be unjust. The applications in question which may be made are many year after year. In some cases it may be just to order the co-respondent to pay the costs even after a long time has elapsed since the decree: in others it may be unjust to award costs against him even where a short time has elapsed since decree. Every case must depend on its own facts. Rule 33 provides that he shall be entitled to be heard on questions of costs provided he has entered an appearance. It would, in our opinion, be right and convenient that provision should be made, if necessary by rule, for making this right effective, by providing that any party to an application who intends to ask for an order for costs against the co-respondent should give him due notice to that effect or possibly by providing that in any order for costs made to discharge it within a limited period after it is served upon him. We see no reason why the right to this measure of protection should be limited to the case of a co-respondent who has entered an appearance.

The decision of *Fenston* v *Fenston*[1] gives effect to the established principle that costs are in the discretion of the court and that it is not competent for a court to fetter its discretion as to costs of future applications in the cause, the circumstances of which cannot possibly be known to it at the date of the decree nisi. Any costs to be incurred subsequently in any ancillary matter should be awarded separately upon the merits of that application.

I do not think that the senior assistant registrar's decision is a rejection of this principle, which is a principle of general application. His decision was based on an interpretation of the words 'costs of these proceedings' in the context of the circumstances of this case. So the question before me is one of construction, ie the ascertainment of the intention of Wahab Ghows J in making the order in the form he did. What did he have in mind when he made the order in those terms? He could have meant what the senior assistant registrar has decided, since maintenance was one of the reliefs prayed for in the petition itself and the expression 'proceedings' is wide enough to include all subsequent proceedings.

I have to disagree with the interpretation given by the senior assistant registrar for the following reason. In my view, where an order of court is capable of being construed to have effect in accordance with or contrary to established principles of law or practice, the proper approach, in the absence of manifest intention, is not to attribute to the judge an intention or a desire to act contrary to such principles or practice but rather in conformity with them. In the present case, to adopt the language of Lord Greene MR in *Fenston* v *Fenston*,[1] if the order on its true interpretation by its own force imposed a liability for all future costs on the respondent, it would be an improper order. Therefore, as the order of Wahab Ghows J is ambiguous, the expression 'in these proceedings' in the said order should be construed to refer only to the proceedings in connection with the primary relief for dissolution of the marriage. The said order should not be construed to mean and does not render the respondent liable for all costs in respect of proceedings subsequent to the hearing of the petition on the dissolution of marriage. Such costs must be asked for and given separately in each subsequent proceeding.

Accordingly, I hold that the petitioner was not entitled to costs in respect of the said 18 items of costs

incurred in subsequent proceedings and for which no order in favour of the respondent had been made. The application is allowed with costs.

Order accordingly.

Solicitors: *Sukumar & Teo; Lim Ganesh & Liu.*

Reported by *PS Ranjan*

The 'Arcadia Spirit'

Esso Singapore Pte Ltd v 'Arcadia Spirit' (Owners of)

HIGH COURT (SINGAPORE) – ADMIRALTY IN REM NO 5 OF 1988
GRIMBERG JC
19 JANUARY 1988

Shipping – Arrest of ship – Release of vessel against provision of letter of guarantee by P & I Club – Rules of the Supreme Court 1970, O 70 r 12(4)

The plaintiff in admiralty in rem proceedings arrested the defendant's vessel, the 'Arcadia Spirit', to enforce their claim for damage done to their berth. Pursuant to O 70 r 12(4) of the Rules of the Supreme Court 1970, the defendant applied for an order for the release of the arrested vessel against the provision of a letter of guarantee by the Japan P & I Club.

Held, allowing the application: (1) The court had discretion under O 70 r 12(4) of the Rules of the Supreme Court 1970 to order the release of the vessel against the provision of a P & I Club letter of guarantee.

(2) The vessel should be released against a letter of guarantee by the Japan P & I Club for the value of the vessel.

Case referred to
1 *The 'Pacific Charger'* unreported New Zealand 1981 Court of Appeal case (folld). See Appendix at p 263.

Legislation referred to
Rules of the Supreme Court 1970 O 70 rr 12(4), 22

M Karthigesu (A Thambiyah with him) for the plaintiffs.
GP Selvam (Kenneth Tan with him) for the defendants.

[*Background Facts:* The plaintiff commenced admiralty proceedings and caused the 'Arcadia Spirit' to be arrested to enforce a claim for damage and/or loss to their oil loading berth at Pulau Ayer Chawan Refinery, Singapore and their wharf facilities in consequence of alleged navigation and/or management of the 'Arcadia Spirit'. They claimed security for the release of the said vessel in the sum of $50 million and in the form of a letter or a bank guarantee.

The defendant offered security in the form of a letter of undertaking to be issued by the Japan Ship Owners' Mutual Protection and Indemnity Association (hereinafter referred to as the 'Japan P & I Club') which was the insurer of the owners of the 'Arcadia Spirit' in respect of owners' liability for the plaintiff's claim.

The amount of guarantee offered was for the sum of $19.7 million on the ground that the plaintiff was not entitled to security in excess of the value of the vessel arrested. The plaintiff refused to accept the defendant's offer and insisted on a bank guarantee or a bail bond.

The defendant applied by notice of motion to the court for the release of the vessel pursuant to RSC 1970, O 70 r 12(4) on the ground that a letter of guarantee by the Japan P & I Club for the value of the vessel was satisfactory and sufficient security to which the plaintiff is entitled. The defendant contended that the Japan P & I Club was a reputable and internationally recognized P & I Club. Its letter of undertaking was accepted by international maritime communities including governments and accordingly it was sufficient and satisfactory security for shipowners' liabilities.

The plaintiff resisted the application on the ground that the security for the release of a ship arrested in admiralty was a matter of agreement between the parties. The court's jurisdiction to order the release of a ship was limited to circumstances when the defendant filed a bail bond as provided in the Rules of the Supreme Court 1970. The plaintiffs furnished a valuation of the vessel at US$13 million. Other submissions appear in the oral judgment of Grimberg JC.]

Grimberg JC (delivering oral judgment): I take the view that O 70 r 12(4) gives me the discretion to order the release of this vessel against the provision of a P & I Club letter of guarantee. P & I Clubs are now acknowledged as being part and parcel of the maritime industry. The unreported New Zealand case, *'Pacific Charger'*,[1] to which Mr Selvam referred, establishes that a Club guarantee has been considered acceptable security by the court in New Zealand. In that case the scope of the New Zealand equivalent of our O 70 r 12(4) was considered. It is obvious, too, from the textbooks, that Club security has become acceptable as a matter of course, when negotiations for security take place outside the rules of court.

There is admittedly a wrinkle, a very important wrinkle, in this case in that here we are dealing with a proposed letter of guarantee to be furnished by a Club which has no presence or assets here, and which resides in a non-Commonwealth and non-common law jurisdiction. Therefore, theoretically, there could be an enforcement problem. However, it seems to me that to allow that possibility to affect my mind would be to adopt a wholly negative approach. I prefer to proceed upon the assumption that the Japan Club – whose guarantees (as the evidence shows) are acceptable to a number of governments, including our own – that such a club which would stand to lose its international reputation were it to default on a guarantee – would fulfil its obligations with honour. Accordingly, I am inclined to order the release of the vessel in consideration of the provision of a letter of guarantee of the Japan Club in terms to be agreed.

I am faced, having made that decision, with the other difficulty arising from the lack of consensus on quantum, coupled with the urgency of the matter. I was